THE NORTHERN SECURITIES DECISION.

BY CARMAN F. RANDOLPH.

I HAVE been asked "to elucidate for the readers of the REVIEW the recent so-called 'merger decision,' its significance and its probable or possible effects"; and in endeavoring to comply with the request I shall confine my observations to several points of general interest.

The suit is brought by the Federal Government under the Anti-Trust Act of July 2nd, 1890, for the purpose of divesting the Northern Securities Company of such control over the Great Northern and Northern Pacific railway corporations as it had gained by acquiring majorities of their respective stocks, partly by purchase for cash, but mainly by the exchange of its own shares for shares of the railways. The Circuit Court for the District of Minnesota, in an opinion by Judge Thayer, finds that the railways were competing inter-State lines, which, through the efforts of a combination of stockholders to which the Securities Company was a party, passed into the control of that Company. The Court decides that the transaction violates the Anti-Trust Act, and it enjoins the Company from voting at any stockholders' meeting of either of the railway corporations, and from exercising any supervision or influence over the acts of these corporations. The Company has appealed the case to the Supreme Court, where it will be argued at the next term.

In the course of its opinion, the Court said that the acts of the defendants "destroyed every motive for competition," and that the "power to suppress competition," obtained by the Securities Company through the purchase of railway shares, amounted to a restraint of commerce. Because of these and other expressions, the Circuit Court has been charged with construing the Act to

condemn mere opportunity to restrain competition, and this either in the transportation or sale of articles of inter-State commerce—a construction which, if at once constitutional and practicable, would discredit a large proportion of our business enterprises.

Opportunity to restrain competition seems to be the vital element in the decision; but, having regard to the facts in the case, we are not warranted in saying that the Court denounces opportunity without regard to the circumstances under which it is gained. Then, the inference that the principle of the decision goes beyond the agencies of transportation directly involved in the case, and affects numerous industrial holding companies and trusts, though well worth attention, is not imperative; for the general disposition of courts to formulate principles with particular regard to the state of facts before them is especially noticeable in inter-State commerce litigation. So we shall comment on the decision chiefly as it affects the agencies of transportation which are clearly within the regulating power of Congress, as distinguished from agencies of sale whose position has not yet been fully determined by the Supreme Court.

With less appearance of exaggeration, the Circuit Court has been said to approve some such proposition as this: Control of two competing agencies of inter-State transportation, however or by whomsoever acquired, amounts to an illegal restraint. I think even this implication is broader than a fair reading of the opinion warrants.

In the first place, the reasoning of the Court does not go so far as to cover control that is not evidenced by possession of obvious power. It does not condemn the control that may be reasonably supposed to accompany the holding of an influential position—such, for example, as may accrue to a railway company which holds a large block of stock in a competing line.

In the second place, even an obvious control of competing agencies may yet be beyond the necessary implications of the Court's opinion. To illustrate this statement, let us take the case of two inter-State ferries. These being smaller undertakings than railways, and not necessarily operated by corporations, offer a greater variety of illustration in the way of acquisition and ownership, yet as transportation works they are in the same cate-

gory with railways in respect of Federal power over commerce. Mr. A. buys one ferry and afterwards inherits the other; or he buys the other from Mr. B., or he marries Mrs. B.; or C. buys out A. and B.: Corporation F., owning one ferry, buys a majority of stock in corporation E., owning the other; or a railway corporation buys majority interests in E. and F.; or an insurance company invests in E. and F. stocks until it holds a majority of each. Reviewing these cases, we find that certainly by the accident of inheritance, and presumably by the incident of marriage, "the motive for competition is destroyed"; but I am sure it would be impossible to read into an Act of Congress a constitutional expression of power either forbidding the heir from operating his ferries or dissolving the marriage as a combination or conspiracy in restraint of trade. In theory of law, then, it is possible for a single interest to exert over two formerly competing agencies of inter-State transportation a control more direct and potent than the Securities Company obtained over the Great Northern and Northern Pacific.

The remaining ferry cases are purchases; and, excepting the insurance company, which may be assumed to buy for investment, the purchasers may be supposed to buy with the purpose of operating the ferries in harmony, and thus gain by intention a control which the heir, the married couple and the insurance company enjoy by force of circumstances. Now, whenever an individual buys out a rival concern, there is commonly a restraint of competition more or less marked; but evidently there is no combination or conspiracy, nor, in the absence of a self-denying agreement on the part of the vendor, is there a contract in restraint of trade. The transaction is an ordinary purchase—a transfer of property from one owner to another. This transaction is not, and, in my opinion, cannot be forbidden by Congress in virtue of the power to "regulate" commerce. So far as individual citizens are concerned, I think the incapacity of Congress to forbid them to make such investments of their money will be not only generally admitted, but will be generally approved as a proper guarantee of personal liberty.

Perhaps a State corporation is commonly supposed to be amenable to a greater Federal power of regulation than an individual citizen of a State, but there is no constitutional warrant for such a distinction. While a State in creating a domestic, or admitting

a foreign, corporation reserves peculiar powers of control over the artificial being it charters or licenses, the Federal Government, which neither charters nor licenses the corporation, has no such powers. Its abilities in the regulation of inter-State commerce are at once comprehensive and even-handed. The individual and the corporation, performing similar acts, may be equally restrained if the act be within the constitutional right of regulation, and must be equally free if the act be essentially lawful. When we say that Congress cannot prevent a man from acquiring a competing ferry by inheritance, we perceive that he may acquire it by purchase; and, by parity of reasoning, we find that a State railway company may, so far as the Federal Government is concerned, acquire any amount of stock in a rival line.

It should be remarked that the decree of the Circuit Court does not treat the Securities Company's possession of the railway stocks as illegal. It does not order their return to the vendors as the Government requested. It simply permits them to be returned. But the decree forbids the Company to vote the stock, and thereby deprives it of the full use and value of its property. Whatever may be the reason for the Court's acquiescence in the Company's possession of stock, while expressly prohibiting the exercise of stockholders' rights, there is in the cases we have supposed no distinction between the right to acquire property and the capacity to enjoy it. The heir coming into possession of the rival ferry is entitled to operate it. The railway buying stock in the rival road is entitled to vote it.

Each of the supposed cases presents a monopoly, which is always a condition in potential restraint of trade; but in none is the monopoly created by "a contract combination or conspiracy in the form of trust or otherwise" condemned by the first section of the Anti-Trust Act. It was well known that the Securities Company obtained a monopoly by its acquisition of railway stocks; but its promoters assumed that this action would be assimilated in Federal law to an independent purchase by an individual. This position, which I have already examined and approved in a law journal,* was presented to the Circuit Court, and doubtless, will be again presented on the appeal. I shall not attempt to develop it here, because the Circuit Court has decided

* "Considerations on the State Corporation in Federal and Inter-State Relations," *Columbia Law Review*, March, April, and May, 1903.

that the Company was a party to a combination, and my comments are limited to the decision.

In the next case of the competing ferries, we have an abatement of competition which is brought about by somewhat different means: A "holding" corporation, organized by stockholders of the ferry companies, obtains control of the ferry stocks. This is like the Northern Securities transaction and of course is condemned by the Court's decision.

The specific proposition underlying the decision seems to be this: When parties interested in competing agencies of inter-State commerce bring them under the control of a corporation which they organize for the purpose, they, together with the corporation, combine in restraint of trade. The corporation is merely a "shield" for conspirators. The Court, while acquiescing in the Company's possession of stocks, does not treat their acquisition as a sale of property from one person to another, which, as I have said, seems to be beyond the reach of the Anti-Trust Act, but as a transfer of property from several individual owners to the same persons as a corporation—a "pooling" of interests. In short, parties whom the Court calls "natural rivals" are deemed to be effectively forbidden by the Anti-Trust Act to make any formal arrangement which permits the management of the properties in harmony, leaving open the question whether they can be prevented from abating their rivalry by informal means.

Passing over some important questions of law and fact suggested by the Court's treatment of the particular case at bar, we come to weighty matters of general concern distinctly involved in the opinion. The Circuit Court holds substantially that evident opportunity to restrain inter-State commerce, when obtained by a combination of interested parties, is condemned by the Anti-Trust Act; and it claims for this reading of the statute an interpretation already decreed by the Supreme Court. Now, the Supreme Court has declared, against the protest of four Justices, that the Act forbids the making of rate agreements by competing railways, even though the rates be not unreasonable. But the Supreme Court has not yet extended the unwholesome principle of this interpretation to other cases. It has not yet decided that the mere opportunity of a combination to restrain competition denotes an illegal condition; and, though it may stand by the letter

of its traffic decisions, it is to be hoped that it will embrace the first opportunity to mitigate the principle which prompted them. While the difference between a traffic association which actually prescribed rates and a holding company which is in a position to administer railways in harmony, may not be a radical one, it is, I think, substantial, certainly perceptible; and the Supreme Court would not break with its traditional method of handling inter-State commerce problems by making an even nicer distinction of fact the basis for an improved exposition of law.

The principle at stake is of far-reaching concern, not only in Federal matters, but in the affairs of the States, whose legislatures and courts should look to the great tribunal of the republic for sound exposition of the fundamental theories of jurisprudence. Opportunity to injure and infliction of injury are generally well differentiated in contemplation of penal law. The law rightly views the former as a condition beyond its normal province, and penal statutes should be construed in harmony with this position unless the text expressly forbids. The phraseology of the Anti-Trust Act does not require the Supreme Court to construe it as forbidding liberty of association wherever accompanied by opportunity to injure. And a definite ruling to this effect might seriously embarrass the treatment of a grave problem by giving to a false principle the sanction of our Supreme Court.

I refer to the problem presented by the associations multiplying throughout the country—associations of corporations, capitalists, trades, working-men, each having to do with commerce in or among the States, and possessing opportunity for grossly injuring the public.

How shall the community perform its duty regarding these mighty forces? To protect persons from impressment into an association by means which the law can properly condemn; to protect them from illegal interference in the pursuit of lawful avocations; to permit association for protection or betterment, with full knowledge that possession of power may lead to its abuse, though in the case of corporations the legislatures responsible for these artificial beings should act with caution and discrimination in this regard; to define, correct and punish abuses; to employ the arm of prevention whenever a true perception of its property shall warrant: this programme outlines the right attitude of a just and liberal community toward associations

that may now and again disturb its equanimity by the arrogance of their pretensions, and it should be substantially followed by our Federal and State governments within their respective spheres. Difficult of complete and impartial execution at best, the programme is likely to be weakened if the Supreme Court shall construe the Anti-Trust Act as denouncing an association or "combination,"—call it what you will—merely because it has an opportunity, and even a motive, to restrain trade by raising rates, or prices, or wages.

If the Supreme Court approve the views of the Circuit Court in regard to opportunity to restrain competition, we may be, at worst, handicapped in dealing with the association problem. Approval of the views now to be considered will deeply and permanently affect the organic relations of the States to the Federal Government.

"By what has been done," says the Circuit Court, "the power has been acquired (and provision made for maintaining it) to suppress competition between two inter-State carriers who own and operate competing and parallel lines of railroad. Competition, we think, would not be more effectually restrained than it is now under and by force of the existing arrangement, *if the two railroad companies were consolidated under a single charter.*" The words I have italicized show that in the mind of the Court the formal consolidation of competing inter-State railways by State authority is, from a Federal standpoint, substantially like the virtual consolidation effected in the present case, and is, therefore, equally illegal under the Anti-Trust Act.

In frankly likening the position of the Securities Company of New Jersey to that of a consolidating corporation created by usual methods, the Court has dissipated a cloud which has enveloped the case ever since the Government filed its petition. The Government never had any reason for questioning the legitimacy of the New Jersey Company at home, for that is within the province of New Jersey, nor any reason for considering the relation of the Company to Minnesota, for that is within the province of Minnesota, and, in fact, is now at issue in a suit brought by the State, a suit, by the way, of interest to many corporations doing business in several States. The Court has clarified discussion by plainly implying that, had the Great Northern and Northern Pacific been

formally consolidated under some sufficient authorization by the States directly interested, they would stand in no better position before Federal law than they do now when consolidated in a sense through the purchase of stock by the foreign corporation of New Jersey. And, in clarifying discussion by the employment of strict, but not evidently unreasonable logic, the Circuit Court brings into relief a novel question of constitutional law of momentous importance. In condemning the consolidation of inter-State railways under State law, it approves a Federal control over State legislatures and a Federal supervision over State corporations, as such, certainly never sanctioned by any judgment of the Supreme Court.

What is an inter-State railway built under State authority? Physically, a continuous line; in contemplation of law, two lines, each authorized by a State and connecting at the boundary; an undertaking legally indistinguishable from the sections of an inter-State toll-bridge or turnpike, even from an ordinary highway which each State lays to a common point in the boundary. In thus authorizing railways in their own territory, the States exercise a right which, except in the case of interference with navigation, Congress cannot abridge by invoking the familiar doctrine that whatever powers the States may exercise in respect of inter-State commerce are permissive, and fail when Congress chooses to exert an exclusive control. Building such roads is not a State regulation of inter-State commerce.

A State being entitled to connect highways of every description with similar highways in a neighboring State, how is it supposed to contravene the Federal power over commerce expressed in the Anti-Trust Act by placing under one corporation two of its railways which are sections of competing inter-State lines? If New Jersey should consolidate the railroads within its boundaries, all freight carried between the cities of New York and Philadelphia by direct route would be subject to a non-competitive rate in its transit through New Jersey. Could the Federal Government break up the new corporation under the Anti-Trust Act? Or, to put the striking question which the reasoning of the Circuit Court provokes at last, Could the Government enjoin New Jersey from expropriating all railways in the State and operating them?

In earlier days, States sometimes granted inter-State bridge rights, with an agreement that no rival bridge should be author-

ized for a long term of years. Though the grantees were limited to a fixed toll, it sometimes happened that, before the expiration of the term, this rate, however reasonable at the beginning, became higher than would-be competitors were ready to accept. Here was a condition in restraint of inter-State trade, so far as this is predicated upon ability to charge higher rates than would obtain under competition. But, surely, the Federal Government was powerless to prevent the owners of the bridge from administering their property, and the Constitution positively forbade the States to authorize a competing bridge in violation of the contract. As inter-State trade was thus "restrained" through the operation of an original State grant pledging monopoly, why can it not be potentially "restrained" by the lighter method of consolidating roads without pledging monopoly?

Limited to transportation agencies, the effect of the Circuit Court's views of State incapacity would be sufficiently serious; but if it should be finally held that all corporations and associations engaged in commerce in more than one State are within the purview of the Anti-Trust Act, the proper province of the States would be flagrantly invaded. To illustrate: in Gibbs *v.* McNeeley, 118 Federal Reporter, 120, an association of manufacturers and dealers in red-cedar shingles in the State of Washington was held amenable to the Anti-Trust Act because their product, which, it seems, is peculiar to Washington, was largely marketed in other States. If this decision and the views of the Circuit Court are both sound, Congress forbids Washington to either consolidate the corporations, or permit the partnership of the individuals engaged in such undertakings. Not even the anticipation that such a Federal power might be loosed upon the anthracite trade of Pennsylvania should commend its recognition. Cheaper coal would be dearly bought at the expense of State rights.

Without discussing fully the constitutional question presented by the Circuit Court, I conclude that, if the Supreme Court shall find that the Northern Securities Company stands in the same relation to the United States as a consolidating corporation created by a State actually controlling the railways in question, it must, with a deeper and sounder appreciation of State rights and Federal limitations, reject the lower Court's conclusions, and declare that Congress is powerless to disrupt consolidations, actual or virtual, consummated under State law. If a State's

right to consolidate its railroads at pleasure is recognized, and I am sure the Supreme Court will not be forced to even question this right by any argument or opinion in the case at bar, what will be the position of the Federal Government in regard to railways whose "motive for competition has been destroyed" by State authority? Must Congress stand by while "The Consolidated Railways of New Jersey" or New Jersey itself takes toll at will upon direct traffic between New York and the South; while all our lines pass under the control of sectional holding companies, perhaps of one huge corporation? Such apprehensions give the prosecution of the Securities Company its popular strength, and they cannot be allayed by demonstrating the improbability of their realization, nor by showing that aggrieved shippers can complain to an Inter-State Commerce Commission authorized to pronounce a given rate exorbitant. To point out that the United States are empowered to parallel State with Federal railways may be an invitation to disaster. To say that they can expropriate and administer the lines, suggests to every one outside the Socialist camp a counsel of despair.

Were the State rights for which I contend really obstructive of a normal and effective exertion of Federal power, they would prove their unconstitutionality by the arrogance of their claims. For there must be a constitutional and practicable procedure by which Congress can maintain the supremacy of its regulating power over inter-State commerce against any real restraint, and I insist that the rational handling of our inter-State commerce problem will be impossible until Congress and the Courts shall appreciate the distinction between real and theoretical restraint. There is a method. When two States granted a bridge monopoly we have seen that they made an inviolable contract, but to this the Federal Government was not a party, and Congress could have protected the public from extortion by fixing a reasonable toll. A Federal power sufficiently vigorous to emasculate the solemn obligations of States is able to cope with any real extortion arising from modern methods of railway consolidation. An Act of Congress authorizing a commission to fix just rates for freight carried by "natural rivals" who, having "destroyed every motive for competition," actually abuse their powers would be a lawful and effective regulation of inter-State commerce.

CARMAN F. RANDOLPH.